

TITLE 326 AIR POLLUTION CONTROL BOARD

DRAFT RULE #97-19(APCB)

DIGEST

This rulemaking adds 326 IAC 17.1, 326 IAC 1-2-6.5, 326 IAC 1-2-20.5 and repeals 326 IAC 17. 326 IAC 17.1 incorporates recent statutory changes to IC 5-14-3, provides for consistent treatment of confidential materials among IDEM program areas, and allows IDEM to simplify and streamline the procedures associated with the submission and handling of confidential information. Effective 30 days after filing with the secretary of state.

HISTORY

First Notice of Comment Period: December 1, 1997, Indiana Register (21 IR 1167).

Second Notice of Comment Period: May 1, 1998, Indiana Register (21 IR 3164).

Notice of First Hearing: February 1, 1999, Indiana Register (22 IR 1606).

Date of First Hearing: March 3, 1999.

326 IAC 17.1

326 IAC 1-2-6.5

326 IAC 1-2-20.5

326 IAC 17

SECTION 1. 326 IAC 17.1 IS ADDED TO READ AS FOLLOWS:

ARTICLE 17.1 PUBLIC RECORDS; CONFIDENTIAL INFORMATION; CONFIDENTIALITY AGREEMENTS

Rule 1. Purpose and applicability

326 17.1-1-1 Purpose

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 5-14-3; IC 13-14-11-5

Sec. 1. The purpose of this article is to provide the following:

- (1) The policy of the air pollution control board, to be followed by the department, in making public records available for public review and copying in accordance with IC 5-14-3, unless the information is determined to be confidential.**
- (2) The provisions for protecting legitimate interests in the confidentiality of certain information.**

(3) The criteria to be used for determining the legitimacy of confidentiality claims in accordance with IC 5-14-3.

(4) The procedures that the commissioner shall use in making determinations on the confidentiality of information.

(5) The form of confidentiality agreements required by IC 13-14-11-5 from employees of the department and from persons under contract to the department.

(Air Pollution Control Board; 326 IAC 17.1-1-1)

326 IAC 17.1-1-2 Applicability

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 13-14-11

Sec. 2. This article applies to the following:

(1) Information received on or after the effective date of this rule from a person requesting confidential treatment of that information. The information may be either:

- (A) treated as a single unit of information even if the information is comprised of a collection of individual items of information; or
- (B) separated into two (2) or more categories to afford different treatment to the information in each category because the claim covers only a portion of the information.

(2) Employees of the department and contractors who:

- (A) make the confidentiality determination;
- (B) handle the confidential information; or
- (C) maintain the file of confidential information.

(3) Public records except for the following:

- (A) In the event of a conflict between this article and 40 CFR 2.301* (Confidentiality of Business Information), both of which are applicable to the information or document, 40 CFR 2.301* shall govern over this article.
- (B) In the event that two (2) or more sections contained in 40 CFR 2.301* apply to the information, the section that provides greater or wider access to the public of the information shall govern.

Copies of the Code of Federal Regulations (CFR) and Federal Register (FR) referenced may be obtained from the Government Printing Office, Washington, D.C. 20402 and are also available for copying at the Indiana Department of Environmental Management, Office of Air Management, Indiana Government Center-North, 100 North Senate Avenue, Indianapolis, Indiana 46204. *(Air Pollution Control Board; 326 IAC 17.1-1-2)

Rule 2. Definitions

326 IAC 17.1-2-1 Definitions

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3
Affected: IC 13-11-2

Sec. 1. The definitions in this rule apply throughout this article. (*Air Pollution Control Board; 326 IAC 17.1-2-1*)

326 IAC 17.1-2-2 “Available to the public” defined

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3
Affected: IC 5-14-3

Sec. 2. "Available to the public" means a public record, as defined by IC 5-14-3, but excluding public records described in 326 IAC 17.1-3-1(b), that the department shall furnish to any member of the public upon request, or may otherwise make public. (*Air Pollution Control Board; 326 IAC 17.1-2-2*)

326 IAC 17.1-2-3 “Claim of confidentiality” or “claim” defined

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3
Affected: IC 5-14-3-4; IC 13-14-11

Sec. 3. "Claim of confidentiality" or “claim” means a claim or assertion that information be treated as confidential because the information is excepted from disclosure under IC 5-14-3-4 (a) or IC 5-14-3-4(b). (*Air Pollution Control Board; 326 IAC 17.1-2-3*)

326 IAC 17.1-2-4 “Contractor” defined

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3
Affected: IC 13-14-11

Sec. 4. “Contractor” means:

(1) any:

- (A) person;**
- (B) association;**
- (C) partnership;**
- (D) corporation;**
- (E) business;**
- (F) educational institution;**
- (G) governmental body; or**
- (H) other entity;**

performing work under contract as an authorized representative of the department;

and

(2) includes a subcontractor of the contractor and employees or officers of the contractor and subcontractor, which have been authorized by the department through the contract to have access to confidential information. (*Air Pollution Control Board; 326 IAC 17.1-2-4*)

326 IAC 17.1-2-5 "Department" defined

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 13-11-2-51

Sec.5. "Department" means the department of environmental management.
(*Air Pollution Control Board; 326 IAC 17.1-2-5*)

326 IAC 17.1-2-6 "Information" defined

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 5-14-3; IC 13-14-11

Sec.6. "Information" means any of the following:

- (1) Written or printed material.
- (2) Data processing card decks, printouts, and tapes.
- (3) Maps.
- (4) Charts.
- (5) Paintings.
- (6) Photographs.
- (7) Drawings.
- (8) Engravings.
- (9) Sketches.
- (10) Samples.
- (11) Working notes and papers.
- (12) Reproductions of such things by any means or process.
- (13) Sound, voice, or electronic recordings in any form, in the possession of the department by which knowledge has been preserved and may be retrieved.
- (14) Any other material;

regardless of physical form or characteristics, without limitation.
(*Air Pollution Control Board; 326 IAC 17.1-2-6*)

326 IAC 17.1-2-7 "Person" defined

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 13-11-2-158

Sec. 7. "Person" has the meaning as set forth in IC 13-11-2-158(a). (*Air Pollution*

Control Board; 326 IAC 17.1-2-7)

326 IAC 17.1-2-8 “Public record” defined

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 5-14-3

Sec. 8. “Public record” has the meaning set forth in IC 5-14-3-2. (*Air Pollution Control Board; 326 IAC 17.1-2-8*)

326 IAC 17.1-2-9 “Trade secret” defined

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 24-2-3-2

Sec. 9. "Trade secret" has the meaning set forth in IC 24-2-3-2. (*Air Pollution Control Board; 326 IAC 17.1-2-9*)

Rule 3. Access to Public Records

326 IAC 17.1-3-1 Access to public records

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 5-14-3; IC 13-14-11

Sec. 1. (a) The provisions of IC 5-14-3 apply to all public records. All information received by the department is considered a public record.

(b) Public records are available to the public except for any of the following public records:

- (1) Received under or supporting a claim of confidentiality.**
- (2) Under review or appeal to determine if confidential under IC 5-14-3-4(a) or IC 5-14-3-4(b).**
- (3) The commissioner has determined to be confidential under IC 5-14-3-4(a) or IC 5-14-3-4(b).**

(c) Public records that are available to the public may be copied by the department upon payment of a fee provided for in IC 5-14-3-8. The fee shall be paid to the cashier's office at the Indiana department of environmental management. (*Air Pollution Control Board; 326 IAC 17.1-3-1*)

Rule 4. Confidentiality Claims

326 IAC 17.1-4-1 Confidentiality claims

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3
Affected: IC 5-14-3; IC 13-14-11

Sec. 1. (a) A person submitting information to the department for which confidential treatment is requested shall make a written claim of confidentiality under subsections (c) and (d) at the time of submittal of the information.

(b) A person may request confidential treatment of information at the time the information is acquired through the actions of the department, such as inspections. The written claim for confidential treatment may be broad, but must be sufficiently clear to allow for accurate identification of the information claimed to be confidential. The supporting information required under subsection (d) must be submitted to the commissioner within five (5) working days from the time the claim of confidentiality is submitted.

(c) A person submitting a claim of confidentiality shall designate and segregate the information and the supporting information to which the claim applies in a manner that is sufficiently clear to allow the department to identify all confidential claim materials. One of the following methods shall be used to indicate confidential claim materials:

- (1) Attaching a cover sheet instructing which information is to be treated as confidential.**
- (2) Marking each page or item of information as:
 - (A) confidential;**
 - (B) confidential claim material;**
 - (C) trade secrets; or**
 - (D) confidential business information.****
- (3) If information is mailed or hand-delivered, marking the envelope as confidential.**

(d) The person submitting the claim has the burden of proving that the information is entitled to confidential treatment under IC 5-14-3 and shall do the following to provide supporting information:

- (1) State facts demonstrating that the information is a specific type of confidential information under IC 5-14-3-4(a) and IC 13-14-11-3(a)(1) or IC 5-14-3-4(b) and IC 13-14-11-3(a)(2).**
- (2) State whether the information has previously been determined to be confidential by the commissioner.**
- (3) Indicate the portion of the information deemed to warrant confidential treatment.**
- (4) Specify the period of time for which confidentiality is requested if the period is to be other than seventy-five (75) years as provided in IC 5-14-3-4(e).**
- (5) Whenever the claim is based on the commissioner's discretionary power to grant**

confidential status to information under IC 5-14-3-4(b) and IC 13-14-11-3(a)(2), state all of the following:

- (A) The statute, regulation, permit or other authority that requires the submission of such information.**
- (B) Facts demonstrating that the information may be treated as confidential under IC 5-14-3-4(b).**

(e) The information in subsections (a) through (d) shall be treated as confidential until the commissioner makes a determination under 326 IAC 17.1-5.
(Air Pollution Control Board; 326 IAC 17.1-4-1)

Rule 5. Determinations on Claim of Confidentiality

326 IAC 17.1-5-1 Determinations

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 4-21.5; IC 5-14-3; IC 13-14-11

Sec. 1.(a) Any determination on a claim of confidentiality submitted after the effective date of this article shall be made in accordance with this rule.

(b) The commissioner shall make a determination on a claim under any of the following conditions:

- (1) The person submitting the claim requests an immediate determination.**
- (2) A member of the public has requested disclosure of the information on which the claim is based.**
- (3) The commissioner decides that a determination is in the best interest of the public.**

(Air Pollution Control Board; 326 IAC 17.1-5-1)

326 IAC 17.1-5-2 Request for additional information

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 4-21.5-3-1; IC 13-14-11

Sec. 2.(a) If the commissioner determines that additional information is required to make a determination on the claim, the commissioner shall notify the person in writing by certified mail, with return receipt requested, stating the following:

- (1) The additional information shall be submitted in accordance with 326 IAC 17.1-4-1(c).**
- (2) The person has twenty (20) days from the date of receipt of the notice to respond.**
- (3) A submission shall be completed in the time frames and by the methods specified**

by IC 4-21.5-3-1(f). A mailing or private carrier delivery shall be confirmed within the twenty (20) day period under subdivision (2) by telephone or facsimile confirmation to the department.

(4) Failure to submit any additional information within twenty (20) days under subdivision (2), or within the time allowed under subsection (c) to provide additional information in support of the claim, will result in a determination based on the information and any supporting information already received.

(5) The additional information shall be treated as confidential until the commissioner makes a determination as required by section 1 of this rule.

(b) If the person fails to submit additional information in accordance with subsection (a), the commissioner will make a determination based on the information and any supporting information already received.

(c) The commissioner may approve an extension of time for submitting additional information if the person makes a request in writing within the twenty (20) days allowed in subsections (a)(2) and (a)(3).

(Air Pollution Control Board; 326 IAC 17.1-5-2)

326 IAC 17.1-5-3 Approval determination

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 4-21.5; IC 13-14-11

Sec. 3.(a) If the commissioner determines that the information shall be held confidential for the full period requested by the person who made the claim under 326 IAC 17.1-4-1(d), the commissioner shall do all of the following:

(1) Notify the person in writing of the determination.

(2) Maintain the information as confidential for the period requested under 326 IAC 17.1-4-1(d), unless ordered by a court of competent jurisdiction to permit access to the information for inspection and copying.

(b) If the commissioner determines that the information is confidential but the period of confidential treatment shall be shorter than that requested by the person under 326 IAC 17.1-4-1(d), the commissioner shall notify the person in writing by certified mail, with return receipt requested stating the following:

(1) The basis for the determination.

(2) The period of time of confidentiality, after which the information will be available to the public.

(3) The right to appeal the commissioner's determination.

(4) The procedure for appealing the commissioner's determination, including the time period provided by IC 4-21.5.

(Air Pollution Control Board; 326 IAC 17.1-5-3)

326 IAC 17.1-5-4 Denial of claim

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 4-21.5; IC 5-14-1.5-6; IC 13-14-11

Sec. 4. If the commissioner determines that the information is not confidential based on 326 IAC 17.1-4, the commissioner shall notify the person who submitted the claim of such determination. The notification shall be in writing, sent certified mail, with return receipt requested, and shall state the following:

- (1) The basis for the determination.**
- (2) Notice that the person may appeal the commissioner's determination.**
- (3) The procedure for appealing the commissioner's determination, including the time period provided by IC 4-21.5.**
- (4) Notice that if the determination is timely appealed, the information shall be treated as confidential until the petition for review is denied or the commissioner is ordered not to treat the information as confidential.**
- (5) Notice that unless the person timely appeals the determination, the information shall be made available to the public.**

(Air Pollution Control Board; 326 IAC 17.1-5-4)

326 IAC 17.1-5-5 Modification of determinations

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 5-14-3; IC 13-14-11

Sec. 5.(a) The commissioner's determination that information is confidential shall continue in effect for the period of time specified in the determination under section 3(a) or 3(b) of this rule, unless the commissioner issues a revised determination stating that the determination under section 1 of this rule no longer accurately describes the information's confidentiality due to any of the following:

- (1) Change in applicable law.**
- (2) Newly-discovered or changed facts.**
- (3) A clearly erroneous previous determination.**

(b) If the commissioner concludes that such a determination under section 1 of this rule is of questionable validity, the commissioner shall do the following:

- (1) Inform the person in writing by certified mail with return receipt requested.**
- (2) Afford the person an opportunity to furnish additional information on pertinent issues on the matter in accordance with section 2 of this rule.**

(c) After consideration of any information timely submitted under subsection (b)(2), the commissioner may make either of the following determinations:

- (1) The information is not confidential.
- (2) The period of entitlement to treatment as confidential information shall end at an earlier date than that determined in accordance with section 1 of this rule.

(d) After the determination provided for by subsection (c) is made, the commissioner shall notify the person in writing by certified mail with return receipt requested stating one of the following:

- (1) That the claim of confidentiality has been approved as provided for in section 3 of this rule.
- (2) That the claim of confidentiality has been denied as provided for in section 4 of this rule.

(Air Pollution Control Board; 326 IAC 17.1-5-5)

Rule 6. Appeals

326 IAC 17.1-6-1 Administrative appeal

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 4-21.5-3

Sec. 1. An appeal of a determination shall be:

- (1) in accordance with IC 4-21.5-3 and rules of the office of environmental adjudication; and
- (2) made by filing a written petition for review with the office of environmental adjudication in accordance with IC 4-21.5-3.

A copy of the petition shall be served on the commissioner concurrent with such filing.

(Air Pollution Control Board; 326 IAC 17.1-6-1)

326 IAC 17.1-6-2 Judicial review

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 4-21.5

Sec. 2. Judicial review of a final order of the environmental law judge shall be in accordance with IC 4-21.5-5.*(Air Pollution Control Board; 326 IAC 17.1-6-2)*

Rule 7. Authorized Disclosure of Confidential Information

326 IAC 17.1-7-1 Authorized disclosure of confidential information

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 13-14-11-6

Sec. 1. Confidential information may be disclosed by the department only in accordance with IC 13-14-11-6. (*Air Pollution Control Board; 326 IAC 17.1-7-1*)

Rule 8. Wrongful Disclosure Penalties

326 IAC 17.1-8-1 Wrongful disclosure penalties

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 4-15; IC 5-14-3-3; IC 5-14-3-10; IC 13-14-11; IC 35-50-3-2

Sec. 1. Penalties for wrongful disclosure of confidential information are contained in IC 5-14-3-10. (*Air Pollution Control Board; 326 IAC 17.1-8-1*)

Rule 9. Confidentiality Agreements

326 IAC 17.1-9-1 Confidentiality agreements

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 5-14-3-10; IC 13-14-11-5

Sec. 1.(a) Persons employed, contracted, or subcontracted by the department must execute a confidentiality agreement enforceable by:

- (1) the state; and**
- (2) the submitter of the information.**

(b) The following is the confidentiality agreement form for state employees:

CONFIDENTIALITY AGREEMENT

FOR STATE EMPLOYEES

I understand that I will have access to certain confidential information submitted to the Indiana Department of Environmental Management pursuant to state or federal statute or rule. This access has been granted in accordance with my official duties as an employee of the state of Indiana.

I understand that confidential information may not be disclosed except as authorized by rules of the board as contained in 326 IAC 17.1. My obligation not to disclose such confidential information includes disclosure to any other employee, officer, or authorized representative of the state or of the United States unless such employee, officer, or authorized representative is concerned with carrying out or implementing IC 13 or when the information is relevant in any proceeding related to enforcement.

I understand that, under Indiana statute IC 5-14-3-10, I am liable for a possible fine of up to five thousand dollars (\$5,000) or imprisonment for up to one (1) year, or both, if I knowingly or intentionally disclose confidential information to any person not authorized to receive it.

I understand that I may be subject to disciplinary action for violation of this

agreement with penalties up to and including dismissal.

I understand that this agreement is enforceable by the State of Indiana and by the person who submits confidential information.

I agree that I will treat any confidential information furnished to me as confidential as established by the department.

(Signature) _____

Name (Typed)

Date

(c) The following is the confidentiality agreement form for employees or officers of contractors:

**CONFIDENTIALITY AGREEMENT
FOR CONTRACTED EMPLOYEE OR OFFICER**

I understand that as an employee or officer of _____, a contractor performing work for the Indiana Department of Environmental Management, I will have access to certain confidential information. This access has been granted to me in order that I can perform my work under the contract.

I understand that such confidential information may not be disclosed by me except as authorized by a state or federal statute or rule. My obligation not to disclose such confidential information includes disclosure to any employee of the Indiana Department of Environmental Management, any employee or officer of any contractor, or any subcontractor unless such employee or officer has executed a confidentiality agreement.

I understand that, under Indiana statute IC 5-14-3-10, I am liable for a possible fine of up to five thousand dollars (\$5,000) or imprisonment for up to one (1) year, or both, if I knowingly or intentionally disclose confidential information to any person not authorized to receive it. In addition, I understand that I may be subject to disciplinary action for violation of this agreement up to and including dismissal.

I understand that this agreement is enforceable by the State of Indiana and by the person who submits confidential information.

I agree that I will treat any confidential information furnished to me as confidential as established by the department.

(Signature) _____

Name (Typed)

Date

(Air Pollution Control Board; 326 IAC 17.1-9-1)

SECTION 2. 326 IAC 1-2-6.5 IS ADDED TO READ AS FOLLOWS:

326 IAC 1-2-6.5 "Board" defined

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 13-11-2-17

Sec. 6.5. "Board" means the air pollution control board. (*Air Pollution Control Board; 326 IAC 1-2-6.5*)

SECTION 3. 326 IAC 1-2-20.5 IS ADDED TO READ AS FOLLOWS:

326 IAC 1-2-20.5 "Commissioner" defined

Authority: IC 13-14-8; IC 13-14-9; IC 13-19-3

Affected: IC 13-11-2-35

Sec. 20.5. "Commissioner" means the commissioner of the Indiana department of environmental management. (*Air Pollution Control Board; 326 IAC 1-2-20.5*)

SECTION 4. THE FOLLOWING IS REPEALED: 326 IAC 17